

APPEAL NO. 023229  
FILED FEBRUARY 4, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on November 18, 2002. The hearing officer determined that the respondent (carrier herein) did not waive its right to contest the appellant's (claimant herein) entitlement to supplemental income benefits (SIBs) for the third quarter and that the claimant is not entitled to SIBs for the third quarter. The claimant appeals, contending that the hearing officer erred in failing to revise the waiver issue and that the claimant did establish he was entitled to SIBs. The carrier responds, arguing that the decision of the hearing officer should be affirmed.

DECISION

Affirmed in part; reversed and rendered in part.

We first address the issue of carrier waiver. The waiver issue reported out of the benefit review conference (BRC) was whether the carrier waived its right to contest the claimant's entitlement to SIBs for the third quarter by failing to timely request a BRC. The hearing officer essentially resolved this issue by determining that the carrier was not obligated to request a BRC concerning the third quarter of SIBs pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.108(d) (Rule 130.108(d)) because this rule only applies by its terms to cases where the claimant was entitled to SIBs for the preceding quarter. In the present case the parties had previously entered into an agreement that the claimant was not entitled to SIBs for the second quarter, but was entitled to SIBs for the first quarter.

The claimant does not argue on appeal that Rule 130.108(d) did not provide a basis for carrier waiver in this case. The claimant argues instead that the waiver issue should have been framed as to whether the carrier waived its right to contest entitlement to SIBs for the third quarter because it failed to comply with Rule 130.108(e), which requires that a carrier that disputes entitlement to SIBs when it did not pay SIBs during the preceding quarter send the claimant, within 10 days of the date it receives an Application for [SIBs] (TWCC-52), a determination stating the carrier's reasons for nonentitlement, and providing instructions for contesting the carrier's determination of nonentitlement. The claimant contends that this was the issue he requested at the BRC, but that benefit review officer framed the issue as one of waiver under Rule 130.108(d) because there was no code for a waiver issue under Rule 130.108(e).

The hearing officer refused add an issue concerning waiver under Rule 130.108(e) or to reframe the waiver issue at the CCH because the claimant had not filed a response to the BRC report requesting this pursuant to Rule 142.7(e). The claimant argues on appeal that the hearing officer's refusal to either reframe the waiver issue or

add an issue as to whether the carrier waived its right to contest entitlement to SIBs for the third quarter by not complying with Rule 130.108(e) constituted reversible error. We do not find merit in the claimant's argument. The hearing officer did not abuse his discretion by refusing to add or reframe an issue over the carrier's objection when the claimant failed to comply with Rule 142.7(e). We further note that Rule 130.108(e) does not in its terms provide that failure to comply with the rule will result in waiver. See Texas Workers' Compensation Commission Appeal No. 960801, decided June 17, 1996; Texas Workers' Compensation Commission Appeal No. 001715, decided September 7, 2000.

The claimant also appeals the hearing officer's determination that the claimant was not entitled to SIBs for the third quarter because he failed to seek employment commensurate with his ability to work and because he was not satisfactorily participating in a full-time rehabilitation program sponsored by the Texas Rehabilitation Commission (TRC) during the qualifying period for the third quarter. There was conflicting evidence concerning the claimant's job search during the qualifying period and we cannot say that the hearing officer erred as a matter of law in finding that the claimant did not seek employment commensurate with ability to work. However, the hearing officer erred as matter of law in finding that the claimant did not satisfactorily participate in a full-time vocational rehabilitation program sponsored by the TRC during the qualifying period.

As stipulated by the parties, the qualifying period for the third quarter was from April 11 through July 10, 2002. The claimant submitted into evidence a TRC Vocational Rehabilitation Services Individualized Plan for Employment (IPE) dated June 18, 2002. According to the IPE, the claimant and the TRC agreed that he would enroll in a community college program leading to an associate degree in social work. The claimant submitted a letter of admission from the local community college, dated June 25, 2002, and attached a curriculum to begin in August 2002 with a completion date of August 2004. The claimant testified that he began attending classes in August 2002 pursuant to the IPE. The carrier did not dispute any of this evidence.

The hearing officer found that the claimant was not satisfactorily participating in the TRC program during the qualifying period. It is apparent from the hearing officer's extensive statement of the evidence that the hearing officer believed that the claimant was not satisfactorily participating in the TRC program during the qualifying period because the claimant did not begin to attend college classes during the qualifying period. This is not the correct legal standard. Whether the claimant was satisfactorily participating in the TRC retraining program hinged on whether he was performing the requirements set out by TRC in the IPE. The claimant enrolled in the community college during the qualifying period. The mere fact that the classes did not begin until after the end of the qualifying period was a function of the community college's schedule and not of the claimant's failure to satisfactorily participate in the TRC program. The claimant began attending classes when classes began after his enrollment. Clearly, during the qualifying period the claimant was participating in the TRC training program. See Texas Workers' Compensation Commission Appeal No. 010483-s, decided April

20, 2001. We reverse the determination of the hearing officer that the claimant was not satisfactorily participating in the TRC program during the qualifying program and render a decision that the claimant was satisfactorily participating. Based upon the claimant's satisfactory participation in a full-time TRC-sponsored vocational rehabilitation program during the qualifying period, we reverse the hearing officer's decision that the claimant was not entitled to SIBs for the third quarter and render a decision that the claimant was entitled to SIBs for this period. We order the carrier to pay these benefits along with interest on any unpaid, accrued benefits.

The true corporate name of the insurance carrier is **FINANCIAL CASUALTY & SURETY INCORPORATED** and the name and address of its registered agent for service of process is

**DARLENE JO HARRIS  
3030 LBJ FREEWAY, SUITE 500  
DALLAS, TEXAS 75381.**

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Gary L. Kilgore  
Appeals Judge

CONCUR:

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Judy L. S. Barnes  
Appeals Judge

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Terri Kay Oliver  
Appeals Judge